BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK A. COLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 239,046
MCCUNE HEATING & COOLING	)	
Respondent	)	
AND	)	
	)	
OHIO CASUALTY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 14, 2000 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on May 11, 2001, in Wichita, Kansas.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for claimant. Douglas D. Johnson of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board, the parties also stipulated that claimant would be entitled to receive benefits for a seven and one-half percent functional impairment to the leg in the event claimant's injuries comprise a "scheduled" injury[1] rather than an "unscheduled" injury.[2]

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[1] See K.S.A. 1997 Supp. 44-510d.

[2] See K.S.A. 1997 Supp. 44-510e.

ISSUES

This is a claim for a January 13, 1998 accident. Claimant alleges that the right knee injury that he sustained in that accident caused him to limp, which, in turn, aggravated his low back.

In the November 14, 2000 Award, Judge Clark awarded claimant a 45 percent work disability (a disability greater than the functional impairment rating), finding that claimant sustained permanent injury to his low back as a result of the right knee injury. In determining the permanent partial general disability, the Judge found that claimant had sustained a 35 percent wage loss and a 55 percent task loss as a result of the January 1998 accident.

Respondent and its insurance carrier contend Judge Clark erred. They acknowledge responsibility for the right knee injury but contest responsibility for the low back. They argue claimant failed to prove that he sustained a permanent low back injury due to the January 13, 1998 right knee injury. Accordingly, they request the Board to modify the Award and grant claimant benefits for a "scheduled" injury to the right lower extremity.

Conversely, claimant contends the Award should be increased. Claimant argues he has a 79 percent task loss and a 100 percent wage loss followed by a 64 percent wage loss, which would create an 89.5 percent work disability followed by an approximate 72 percent work disability. In the alternative, claimant argues he has a 79 percent task loss and a 35 percent wage loss, which would create a 57 percent work disability.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds as follows:

1. On January 13, 1998, claimant injured his right knee when he tripped in a frozen rut, twisted and fell. The parties stipulated that claimant's accident arose out of and in the course of employment with respondent, a heating and air conditioning company.

2. Within days of the accident, claimant came under treatment of, among others, a Dr. Pollock, who performed a medial meniscectomy of the right knee on January 27, 1998. But claimant continued to experience pain and catching in the knee and the doctor referred him to Dr. Bradley W. Bruner for an evaluation for a possible meniscal transplant. Dr. Bruner did not recommend a transplant but, instead, on May 8, 1998, performed a debridement and partial synovectomy.

3. Dr. Bruner eventually released claimant from treatment on September 15, 1998, with medical restrictions. Claimant then contacted respondent about returning to work and respondent advised that claimant could not return to work as it would not accommodate his restrictions. According to claimant's uncontradicted testimony, he then began looking for work three to five times a week. For an undisclosed period, claimant received unemployment benefits.

4. In approximately September or October 1998, claimant gradually began experiencing symptoms in his low back. Claimant attributed those symptoms to the limp that he had developed from the right knee injury. When claimant testified at the June 2000 regular hearing, he was continuing to limp despite having physical therapy that focused upon eliminating the altered gait. According to the medical histories claimant provided to physicians in May and September 1999, claimant believes the first surgery provided some benefit but the second surgery did not.

5. For approximately three months beginning March or April 1999, claimant worked approximately 15 hours per week earning $7 per hour driving school children home. Claimant's job ended when claimant's employer ceased operations.

6. At the June 29, 2000 regular hearing, claimant testified that after the driving job ended he resumed his job search and again began looking for work three to five times per week. Claimant also testified that he was moving to Virginia that day and planning to work for his brother-in-law's lawn mowing business. Claimant estimated that he would earn either $6.50 or $7 per hour and work between 20 and 40 hours per week, depending upon the weather. By the time of the regular hearing, claimant had discontinued his job search as he admitted that he had not looked for work for several months, since either March or April 2000, when his wife decided they were moving to the East Coast.

7. Respondent and its insurance carrier's attorney hired Dr. Philip R. Mills, who is board-certified in physical medicine and rehabilitation, to evaluate claimant for purposes of this claim. The doctor examined claimant on May 6, 1999, and diagnosed (i) internal derangement of the right knee following two arthroscopic surgeries with a medial meniscectomy and scarring reported, (ii) back pain, and (iii) depression. The doctor indicated that the only explanation for claimant's back complaints was his altered gait.

8. Using the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), Dr. Mills determined claimant had a seven percent functional impairment to the right lower extremity. The doctor determined claimant's back condition fell within the AMA *Guides* DRE Lumbosacral Category I and, therefore, the back should be rated as a zero percent functional impairment.

9. Dr. Mills interpreted the fourth edition of the *Guides* as requiring either a zero percent or five percent functional impairment rating for claimant's back, and as claimant's impairment was closer to zero than to five percent, the doctor chose the zero percent

rating. But the doctor noted that on one other occasion he rated an individual having similar symptoms as having a one percent whole body functional impairment. Moreover, Dr. Mills testified that claimant has a permanent impairment due to his back despite the question of what number should be used to rate it. The doctor stated, in part:

> Q. (Mr. Slape) Doctor, I believe one question to you was that you assigned no permanent impairment as a result of the back injury. Would it be a more correct statement that you gave a zero percentage for his back impairment?
>
> A. (Dr. Mills) That is correct.
>
> Q. Had you been using the Third Edition, you would have given him a percentage for his permanent impairment?
>
> A. That is correct.
>
> Q. So he has a permanent impairment. It is just a question of what number we put down. Is that correct?
>
> A. Yes. And I should have been more precise in answering that question.[3]

10. Dr. Mills recommended that claimant avoid squatting, avoid prolonged walking, limit lifting to no greater than 75 pounds, limit kneeling, avoid ladders and limit climbing stairs. The doctor testified the 75-pound lifting restriction was applicable to both claimant's back and knee injuries.

11. During his deposition, Dr. Mills reviewed the task loss analysis prepared by human resources expert Jerry Hardin and adopted that task loss analysis as his own, recognizing that Mr. Hardin's task list contained duplicate tasks. Considering all of the tasks listed, Dr. Mills believes that claimant lost the ability to perform 18 of the 23 tasks.[4]

The Board agrees that Mr. Hardin's task list contains duplicates. When the duplicate tasks are eliminated, Dr. Mills' testimony would establish that claimant has lost the ability to perform six of the nine, or approximately 67 percent, of the former job tasks that he performed in the 15 years immediately preceding the January 13, 1998 accident.

12. Claimant's attorney hired Dr. Pedro A. Murati, who is also board-certified in physical medicine and rehabilitation, to provide an expert medical opinion for purposes of this claim.

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[3] Deposition of Dr. Philip R. Mills, May 2, 2000; pp. 29, 30.

[4] Judge Clark found that claimant sustained a 55 percent task loss but that was apparently based on a mistaken belief that Mr. Hardin's task list contained 33 former tasks instead of 23.

The doctor examined claimant in September 1999 and diagnosed (i) right knee pain secondary to trauma, following meniscectomy and synovectomy and (ii) low back pain secondary to sprain due to an antalgic gait. The doctor based his finding of low back sprain upon the physical examination, which revealed positive findings for muscle spasm, tenderness in the vertebral bodies and the lack of range of motion.

13. Using the fourth edition of the AMA *Guides*, Dr. Murati rated claimant as having an eight percent whole body functional impairment due to the right knee, a two percent whole body functional impairment due to loss of range of motion in the lumbar spine and a five percent whole body functional impairment due to lumbar strain, all of which combine for a 15 percent whole body functional impairment.

14. Dr. Murati recommended that claimant observe the following work restrictions and recommendations: no ladder climbing; no squatting, crawling, kneeling or using repetitive foot controls with the right foot; only occasionally bend and climb stairs; frequently sit, stand, walk and drive; limit occasional lifting, carrying, pushing or pulling to 50 pounds; limit frequent lifting, carrying, pushing and pulling to 30 pounds; and limit constantly performing those same activities to 20 pounds; use lumbar support while sitting, driving and lifting; use good body mechanics at all times; and alternate sitting, standing and walking.

15. Dr. Murati also reviewed the task loss analysis prepared by Jerry Hardin and adopted it as his own. Dr. Murati's task loss opinion mirrors that of Dr. Mills. Accordingly, Dr. Murati believes claimant has lost the ability to perform 18 of 23 of his former work tasks when duplicate tasks are not eliminated, and six of nine, or approximately 67 percent, of his former tasks when the duplicate tasks are eliminated.

16. Claimant presented the testimony of Jerry Hardin. According to Mr. Hardin, despite claimant's accident and the restrictions placed upon him by either Dr. Mills or Dr. Murati, claimant retains the ability to earn $280 per week.

17. The Board finds that claimant's functional impairment rating for the back and knee injuries lies somewhere between the rating provided by Dr. Mills and that provided by Dr. Murati. Accordingly, the Board finds that claimant has sustained a nine percent whole body functional impairment for the injuries to his right knee and back.[5]

CONCLUSIONS OF LAW

1. The Award should be modified as indicated below.

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[5] Dr. Mills stated that claimant had a seven percent permanent partial impairment to the right lower extremity based on the *Guides* Table 64, at page 85. That table provides that such impairment to the lower extremity constitutes a three percent whole body functional impairment. Averaging three percent and 15 percent equals the nine percent whole body functional impairment found above.

2. The Board concludes that it is more probably true than not that claimant's January 13, 1998 accident and the resulting right knee injury caused an antalgic gait, which, in turn, caused permanent injury to his low back. That conclusion is supported by the testimony from both Dr. Murati and Dr. Mills. Dr. Murati provided a permanent functional impairment rating for claimant's low back. Dr. Mills strictly adhered to the fourth edition of the AMA *Guides* and assessed a zero percent functional impairment rating for claimant's low back but, nonetheless, testified that claimant had sustained permanent impairment in his back.

3. The Board also concludes that it is more probably true than not that the permanent impairment to claimant's back is the result of the limp, or antalgic gait, that claimant developed following the right knee injury that he sustained in the January 13, 1998 accident at work. That conclusion is also supported by the medical opinions provided by both Dr. Mills and Dr. Murati.

4. Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against having a work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

injury wages should be based upon an ability to earn rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

5. Based upon claimant's uncontradicted testimony, the Board finds that claimant made a good faith effort to find appropriate employment following his September 15, 1998 release from Dr. Bruner until he obtained employment driving a school van on approximately March 1, 1999. Accordingly, for the period from September 16, 1998, through February 28, 1999, claimant was unemployed and his 100 percent wage loss should be used in the wage loss prong of the permanent partial general disability formula.

6. From approximately March 1, 1999, through May 31, 1999, claimant was employed as a school van driver earning approximately $105 per week. Accordingly, for that three-month period claimant had a 76 percent wage loss (comparing the post-injury wage of $105 to the agreed pre-injury wage of $431.25), which should be used in the wage loss prong of the disability formula.

7. From approximately June 1, 1999, through February 29, 2000, claimant was unemployed but looking for work three to five times per week. Therefore, claimant was making a good faith effort to find employment during that period and his 100 percent wage loss should be used to compute his permanent partial general disability for that period.

8. As of approximately March 1, 2000, claimant discontinued his job search. Therefore, claimant has failed to prove a good faith effort to find appropriate employment for the period commencing that date. Accordingly, the Board must impute a post-injury wage, which the Board finds to be $280 based upon Jerry Hardin's uncontradicted testimony. The Board concludes claimant has a 35 percent wage loss commencing March 1, 2000.

The Board notes that claimant has requested to base his post-injury wage loss upon the wages that he expects to earn working for his brother-in-law. But the Board finds claimant's wage expectations are based on speculation and, accordingly, the Board will not use claimant's estimates. The permanent partial general disability formula contemplates comparing actual pre- and post-injury earnings in determining the wage loss prong. And when the amount of the post-injury earnings changes, the parties are entitled to seek a review and modification of the Award.

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[8] *Copeland*, p. 320.

9. Based upon the opinions provided by Dr. Mills and Dr. Murati, the Board concludes claimant has sustained a 67 percent task loss due to the injuries to his right knee and low back. Averaging that task loss with the various percentages of wage loss, claimant has the following permanent partial general disability for the following periods:

> For the period from September 16, 1998, through February 28, 1999, claimant has a 67 percent task loss and a 100 percent wage loss, which creates an 84 percent permanent partial general disability.
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> For the period from March 1, 1999, through May 31, 1999, claimant has a 67 percent task loss and a 76 percent wage loss, which creates a 72 percent permanent partial general disability.
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> For the period from June 1, 1999, through February 29, 2000, claimant has a 67 percent task loss and a 100 percent wage loss, which creates an 84 percent permanent partial general disability.
>
> For the period commencing March 1, 2000, claimant has a 67 percent task loss and a 35 percent wage loss, which creates a 51 percent permanent partial general disability.

10. The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the Award to grant claimant the following permanent partial general disability benefits for the following periods:

Mark A. Cole is granted compensation from McCune Heating & Cooling and its insurance carrier for a January 13, 1998 accident and resulting disability. Based upon an average weekly wage of $431.25, 38.12 weeks of temporary total disability benefits are due at $287.51 per week, or $10,959.88.

For the period from September 16, 1998, through February 28, 1999, 23.71 weeks of benefits are due at $287.51 per week, or $6,816.86, for an 84 percent permanent partial general disability.

For the period from March 1, 1999, through May 31, 1999, 13.14 weeks of benefits are due at $287.51 per week, or $3,777.88, for a 72 percent permanent partial general disability.

For the period from June 1, 1999, through February 29, 2000, 39.14 weeks of benefits are due at $287.51 per week, or $11,253.14, for an 84 percent permanent partial general disability.

For the period commencing March 1, 2000, 123.87 weeks of benefits are due at $287.51 per week, or $35,613.86, for a 51 percent permanent partial general disability and making a total award of $68,421.62.

As of December 20, 2001, claimant is entitled to receive 38.12 weeks of temporary total disability compensation at $287.51 per week in the sum of $10,959.88, plus 170.28 weeks of permanent partial general disability compensation at $287.51 per week in the sum of $48,957.20, for a total of $59,917.08, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $8,504.54 shall be paid at $287.51 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director